



MARCH 2019

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Federal Procurement Spring Survival Guide

As of this fiscal year, all school districts that purchase goods or services with federal grant funds must comply with new federal regulations that were adopted a few years back. This is an important issue for schools to consider as they enter into contracts this spring to obtain federally funded goods and services.

By way of background, in 2013 the U.S. Office of Management and Budget (“OMB”) published the Uniform Guidelines requiring states and non-federal agencies to follow and adopt procedures and policies for purchasing goods and services with federal grant funds. The Uniform Guidelines became effective in 2014. However, the OMB granted a series of grace periods that delayed implementation of the new rules. The most recent grace period expired in December 2017; therefore, the rules became effective at the expiration of each entity’s fiscal year that occurred after that date.

For most Ohio schools, the new rules took effect July 1, 2018. This means that auditors will begin to audit districts on those procedures this school year. Some districts may have been audited this past year if the district adopted new policies and procedures before the expiration of the last grace period and failed to indicate in writing that they planned to take advantage of the final grace period. It is also important to note that the standards set out in the Uniform Guidance will not apply to contracts that were executed prior to the effective date of the rules.

The Uniform Guidance requires non-federal entities to use one of five specific purchasing methods for all nonpayroll purchases. 2 C.F.R. §200.371-318. The five procurement methods included in the Uniform Guidance are as follows:

1. **Micro Purchase Method** – for purchases with an aggregate dollar amount that does not exceed the Micro Purchase Threshold, which is currently set at \$10,000 (note that districts may set a lower threshold in board policy). Under this method, a district must consider costs but is not required to solicit competitive quotes. To the extent practicable, the district must distribute micro-purchases equitably among qualified suppliers.

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2. **Small Purchase Method** – for purchases that do not exceed the Simplified Acquisition Threshold, which is currently set at \$250,000 (note that districts may set a lower threshold in board policy). Here, an agency must obtain price quotations from an “adequate number of qualified suppliers.” The entity’s policy should define the number of quotes they believe to be adequate.
3. **Sealed Bid Method** – for purchases that exceed the small purchase threshold where bids are publicly solicited, and a firm fixed price contract is awarded to the responsible bidder who confirms all the terms and conditions of the invitation and has the lowest price. School districts will likely not use this method very frequently.
4. **Competitive Proposals** - for purchases that exceed the small purchase threshold with more than one source submitting an offer for a fixed price or cost-reimbursement type contract. This method should be used when the Sealed Bid Method is not appropriate. The district is to evaluate the bidders on cost and other factors it has established in order to select the most qualified candidate.
5. **Noncompetitive Proposals** – for purchases through a non-competitive solicitation under one of the following conditions:
 - a. The item is available only from a single source;
 - b. The public exigency or emergency for the requirement will not permit a delay in purchase;
 - c. The federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the nonfederal agency or;
 - d. After solicitation of a number of sources, competition is determined to be inadequate.

A school district’s compliance with the Uniform Guidance will be subject to audit each year. The state auditor’s office has stressed that it is critical for school districts to maintain documentation to demonstrate that it has complied with the regulations set forth in the Uniform Guidance. This documentation should illustrate why a particular method was selected and how the district went about purchasing in accordance with their policies and guidelines. School districts should also be aware that a decision to use noncompetitive proposals may trigger stricter scrutiny and review than purchases made with other methods.

It is also important to note that there have been many questions about how the new regulations impact service contracts with Educational Service Centers (“ESCs”) in particular. Many services obtained through ESC contracts are paid for at least in part with federal funds. Two separate statutes, R.C. § 3313.843 and § 3313.845, define what types of contractual relationships that districts may have with ESCs. State law also specifically requires most districts to have a contract and be affiliated with an ESC if they have a student population at or below sixteen thousand. Unfortunately, this statutory structure does not fit neatly into the new Uniform Guidance. It is unclear at this time whether school districts may use noncompetitive proposals, specifically through sole source, to procure federally funded services through ESCs. The Ohio Department of Education plans to publish additional guidance about how it believes the new procurement regulations apply to ESC contracts. The guidance is expected in the near future. In the meantime, contact legal counsel if you have questions about which method of procurement you should use for these and any other types of federally funded contracts.

What this means for your district

Districts should carefully review board policies and guidelines that pertain to federal procurement with staff who may be responsible for obtaining goods and services with federal grant funds. They should carefully consider how purchasing will be documented in anticipation of an audit. Districts should also review the terms adopted in policies and procedures with their policy providers to make sure that the policies are up to date.

Post-*Janus* Lawsuits Resolved

In a 5-4 decision made last June, the U.S. Supreme Court ruled that the extraction of agency fees from Illinois State's nonconsenting employees of the public-sector violates their First Amendment rights. After the decision was made, all workers who attempted to withdraw their consent to extract agency fees were refunded the money taken under the policy. The court stated that, "States and public-sector unions may no longer extract agency fees from nonconsenting employees. ... employees must choose to support the union before anything is taken from them."

The Supreme Court decision is sparking class action lawsuits across the country. In Ohio, *Smith v. AFSCME* has been monumental for post-*Janus* rulings. The suit was filed by several employees across Ohio who are employed by local government agencies. All the employees attempted to withdraw their union membership and their dues deduction authorization following the *Janus* ruling. They claimed that they were each denied their First Amendment right when union officials continued to extract dues. Union officials relied on the "15-day window period" that only allowed employees to withdraw from the union 15 days prior to the expiration of the collective bargaining contract. This led to the employees filing suit against AFSCME, alleging that the policy was unconstitutional.

The employees were represented by the National Right to Work Legal Defense Foundation, who also represented Mark Janus in *Janus*. At the end of January 2019, the case was finally settled. Under the terms of the settlement agreement, AFSCME agreed to pay back all union dues that were extracted after the employees attempted to withdraw their consent. The union will not deduct any agency fees or dues that were previously subject to the window policy. This is a significant case because it is the first class action lawsuit since the *Janus* ruling in which union officials have reversed their policy on the window period. President of the National Right to Work Foundation, Mark Mix, said, "This first-in-the-nation victory in a class action case to enforce workers' rights under *Janus* should be the first of many cases that result in union bosses dropping their illegal restrictions on workers seeking to exercise their rights secured in the Foundation's *Janus* Supreme Court victory." As of January 24th, Foundation was litigating 20 cases nationwide to enforce employee rights.

What this Means for Your District

The *Janus* and *Smith* cases are important for your district because it is no longer legal to require a fair share fee from non-member's and may not be legal to enforce any version of the "15-day window policy" on withdrawing union membership. Not every school in Ohio has agency fee provisions or window policies in their collective bargaining contracts. For those that do, it is essential that you contact your union regarding information about those provisions.

Cyber Security Concerns for Student Data Addressed in New Report

School districts generate immense amounts of personal, sensitive data about students every day, resulting from the technological boom in the education system. Digital record-keeping has nearly replaced all paper files and the classroom environment has shifted from pencil and paper to digital connectivity.

Last month, two advocacy groups out of Colorado and New York released "The State Student Privacy Report Card: Grading the States on Protecting Student Data Privacy." The research conducted and summarized in the report was aimed at evaluating each state's student privacy laws and grading them on how well the data is protected. The report concluded that Ohio and other states could be substantially better in protecting privacy.

The report card used seven categories to evaluate each state: 1) Parties Covered and Regulated; 2) Transparency; 3) Parental and Student Rights; 4) Limitations on Commercial Use of Data; 5) Data Security Requirements; 6) Oversight, Enforcement, and Penalties for Violations; and 7) Other Provisions. The categories were each given a specific weight based on how the researchers perceived the states performed in protection on

student privacy for each of the areas. The analysis focused on 99 laws that were passed in 39 states between 2013 and 2018. Ohio ranked 40th overall in the grade report. The states below Ohio were those that have not passed any legislation in the past 6 years. Ohio received an F in every category except Parties Covered and Regulated, in which the state received a D-. Ohio is somewhat behind the curve of states who have passed legislation that is more comprehensive according to the report. The report has received criticism from many sources, including the Ohio Department of Education.

While research was being conducted, and amid cybersecurity threats, the FBI released a Public Service Announcement in September 2018 in response to two recent cyber attacks on EdTech companies. The FBI warned parents and educators that, “data collection and unsecured systems could pose risks to students.” The FBI urged schools to keep a closer eye on student data but focused more on the parents and families of students. “The increased use of connected digital tools in the learning environment and widespread data collection,” the FBI warns, “introduces cybersecurity risks of which parents should be aware.” The FBI encouraged parents and families to research existing student and child privacy protections and state laws as they apply to EdTech services; discuss how EdTech programs are used in their schools; research parent coalition and information-sharing organizations; research school related cyber breaches; consider credit or identity-theft monitoring; and conduct regular internet searches.

What this means for your district

It is critical that districts train staff about how to maintain and protect student and other confidential records. School districts should carefully monitor how information is being released to other school officials as well as third parties. Contracts for information technology services should include language which clearly addresses how third parties will access, store and maintain confidentiality of records. School officials should audit data storage and security protocols on a regular basis and should ensure that IT staff monitor and respond to emerging threats. Finally, districts should create a data breach response plan that addresses how schools will expeditiously respond in the event of a data breach.

Special Education Spotlight: Due Process Filings on a Downward Trend

The Center for Appropriate Dispute Resolution in Special Education (CADRE) reports that due process complaint filings decreased nationally from the 2015-2016 school year to the 2016-2017 school year. A review of Ohio Department of Education records shows that in 2017 there were fewer than 10 due process complaints that actually went to a hearing and resulted in a decision.

In 2015-2016 school year there were 19,737 due process complaints filed nationwide. In the same year there were 9,034 mediation requests. In the 2016-2017 school year there were 18,490 due process complaints filed. Conversely, the number of mediation requests increased to 11,413.

What is causing this decline? CADRE optimistically reports that a concurrent increase in mediation requests means that increased use of mediation has caused a decreased use of due process complaints. Of course, it is difficult to know if this is a causal relationship, or simply correlational. Regardless, it is positive news that due process complaints appear to be on the decline nationally, and that the vast majority of those filed in Ohio are resolved before a formal hearing decision is rendered.

Due process cannot always be avoided and is rarely initiated by schools. Due process can be a costly process – not just in terms of legal, court reporter, and hearing officer costs. Due process hearings are time-consuming. School witnesses often find the experience of testifying to be uncomfortable at best. Even when parents file the complaint, they often seem to be less than thrilled with actually proceeding with the formal dispute. Many of the costs of due process (court reporter fees, hearing officer fees, attorneys) are incurred even when a district wins the dispute.

Having it out in a due process hearing should be viewed as a last resort when the party's positions are truly irreconcilable. The national trends indicate that this is being recognized by more and more parents and school districts.

The Ohio Department of Education makes mediators and facilitators available free of charge to school districts. There is no requirement to wait until a due process complaint has been filed. More information is available from ODE at: <http://education.ohio.gov/Topics/Special-Education/Dispute-Resolution>

Additionally, careful consideration should be given to when to seek legal counsel. Most student service directors will never have a full due process hearing in their careers, given current trends. On the other hand, attorneys practicing in special education generally only get called when a situation is already contentious. Proactive legal consultation can result in reduced costs in time and treasure by avoiding due process and other more formal dispute resolution. Strategic investments in high quality professional development for legal compliance can also help reduce the likelihood of your district becoming a due process complaint statistic.

Upcoming Deadlines

As your school district prepares for the next couple of months, please keep in mind the following upcoming deadlines. For questions about these requirements, please contact an Ennis Britton attorney.

- **March 1** – Deadline to take action on and deliver written notice of nonrenewal of superintendent's contract (RC 3319.01); Deadline to take action on and deliver written notice of nonrenewal of treasurer's contract (RC 3313.22); Deadline to publish joint statement describing how district's business advisory council has fulfilled its responsibilities (RC 3313.821)
- **March 22** – Boards of elections must update and publish notices of May 7 primary/special election by this date (RC 3511.16)
- **March 31** – End of second ADM reporting period (RC 3317.03)
- **April 8**: Deadline for voter registration for May election – 30 days before election (RC 3501.10(B), 3503.01, 3503.19)
- **April 29**: Deadline to submit certification for income tax levy to Ohio Department of Taxation for August 6 Special Election (RC 5748.02)
- **May 3**: Deadline to submit August emergency or current operating expenses tax levy to county auditor for August special election (RC 5705.194, 5705.195, 5705.213)
- **May 7**: Primary election day (RC 3501.01, 3501.32)

Upcoming Presentations

SAVE THE DATE! 2018–2019 ADMINISTRATOR'S ACADEMY SEMINAR SERIES

April 18, 2019: Student Privacy

Keep current on FERPA, CIPA, COPPA, and other federal and state laws that impact student – and staff – privacy issues in your district.

July 11, 2019: 2018–2019 Education Law Year in Review

Find out the new education-related laws that passed in the budget bill and other legislation, as well as important court decisions and other changes that affect Ohio schools.

You spoke, and we listened! Based on client input regarding the preferred format for Ennis Britton's Administrator's Academy Seminar Series, these presentations will now be offered via a live video webinar professionally produced by the Ohio State Bar Association. As always, an archive will be available also.

Participants must be registered to attend each event. All three webinars will be archived for those who wish to access the event at a later time. You may register on our [website](#) or contact Kayla via [email](#) or phone at 513-674-3451.

OTHER UPCOMING PRESENTATIONS

March 1: ALAS 2019

Leading with the Heart and Mind

Presented by John Britton

March 2: OSBA Special Education Law Workshop

Proactive and Reactive: Responding Appropriately to Students with Extreme Behaviors

Presented by Jeremy Neff

March 6: Northwest Ohio Association of School Business Officials

Legal Update

Presented by Erin Wessendorf-Wortman

March 12: State Support Team 12

Special Education Legal Update

Presented by Jeremy Neff and Erin Wessendorf-Wortman

Progress Monitoring and LRE

Presented by Hollie Reedy

March 13: Hamilton Clermont Cooperative

Hot Topics in Cyberlaw

Presented by Ryan LaFlamme

March 15: OSBA Cyberlaw Workshop 2019

Top Ten Cyberlaw Concerns Facing Schools

Presented by Ryan LaFlamme and Hollie Reedy

March 20: Trumbull County ESC

Spring Legal Update

Presented by Giselle Spencer

April 25: Ohio Association of School Business Officials Annual Workshop

Into the Woods: Advanced Public Records Law

Presented by Hollie Reedy

April 25: Ohio Association of School Business Officials Annual Workshop

Leave it to Me: Understanding Leave Options Available to School Employees

Presented by Gary Stedronsky

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Want to stay up-to-date about important topics in school law?
Check out Ennis Britton's [Education Law Blog](#).

Webinar Archives

Did you miss a past webinar or would you like to view a webinar again? If so, we are happy to provide that resource to you. To obtain a link to an archived presentation, contact Kayla via [email](#) or phone at 513-674-3451. Archived topics include the following:

Labor and Employment

- School Employee Nonrenewal
- Employee Licensure
- School Employee Leave and Benefits
- Managing Workplace Injuries and Leaves of Absence
- Requirements for Medicaid Claims
- Discrimination: What Administrators Need to Know

Student Education and Discipline

- New Truancy and Discipline Laws – HB 410
- Transgender and Gender-Nonconforming Students
- Student Discipline

School Finance

- School Levy Campaign Compliance

School Board Policy

- What You Should Know about Guns in Schools
- Crisis, Media, and Public Relations
- Low-Stress Solutions to High-Tech Troubles
- Ohio Sunshine Laws

Special Education

- Three Hot Topics in Special Education
- Supreme Court Special Education Decisions
- Special Education Scramble (2018)
- Special Education Legal Update (2017)
- Special Education Legal Update (2016)
- Effective IEP Teams

Legal Updates

- 2017–2018 Education Law Year in Review
- 2016–2017 Education Law Year in Review
- 2015–2016 Education Law Year in Review

Ennis Britton Practice Teams

At Ennis Britton, we have assembled a team of attorneys whose collective expertise enables us to handle the wide variety of issues that currently challenge school districts and local municipalities. From sensitive labor negotiations to complex real estate transactions, our attorneys can provide sound legal guidance that will keep your organization in a secure position.

When you have questions in general areas of education law, our team of attorneys help you make competent decisions quickly and efficiently. These areas include:

Labor & Employment Law

Student Education & Discipline

Board Policy & Representation

There are times when you have a question in a more specialized area of education or public law. In order to help you obtain legal support quickly in one of these areas of law, we have created topic-specific practice teams. These teams comprise attorneys who already have experience in and currently practice in these specialized areas.

Construction & Real Estate

Construction Contracts • Easements •
Land Purchases & Sales • Liens •
Mediations • Litigation

Team Members:

Ryan LaFlamme
Bronston McCord
Giselle Spencer
Gary Stedronsky

Workers' Compensation

Administrative Hearings •
Court Appeals • Collaboration with TPAs •
General Advice

Team Members:

Ryan LaFlamme
Pam Leist
Giselle Spencer
Erin Wessendorf-Wortman

Special Education

Due Process Claims • IEPs • Change of
Placement • FAPE • IDEA • Section 504 •
any other topic related to Special Education

Team Members:

Megan Bair
John Britton
Bill Deters
Michael Fischer
Pam Leist
Jeremy Neff
Hollie Reedy
Giselle Spencer
Erin Wessendorf-Wortman

School Finance

Taxes • School Levies •
Bonds • Board of Revision

Team Members:

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